92-1857

No.

Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

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Re: Royal Food Products, Inc.

Petitioner

v.

Buckeye Union Insurance Company, et al.,

Respondents

==========

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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EDITOR'S NOTE

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QUESTIONS PRESENTED FOR REVIEW

I. Does not a highly constricted de novo review that ignores critical elements of the pleadings followed by a Rule 12[b][6] dismissal constitute a deprivation of the constitutional right to trial?

II. Would not actions over a period of two years by a conspiracy among counsel as directed by their insurance company clients which demonstrate the use of perjury, fraud and other misconduct constitute such a pattern of racketeering activity as is prohibited by the Racketeer Influenced and Corrupt Organizations Act.

LIST OF PARTIES

In accordance with Rule 21[B], the following is a list of all parties in the court whose judgment is sought to be reviewed:

Petitioner: Royal Food Products, Inc.

Attorney: Theodore R. Saker

Respondents:

Buckeye Union Insurance Co.

Seasonings, Etcetera, Inc.

American States Insurance Co.

Crabbe, Brown, Potts, Jones&Schmitt

Lane Alton & Horst

Wirtz & Kohn

Timothy McCarthy

Florence Nay

Attorneys for Respondents:

Luis Alcalde

Franklin Eck

Thomas J. Keener

Jeffrey Kohn

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I. Does not a highly constricted de novo review that ignores critical elements of the pleadings followed by a Rule 12[b][6] dismissal constitute a deprivation of the constitutional right to trial?

II. Would not actions over a period of two years by a conspiracy among counsel and their insurance company clients demonstrating perjury, fraud and other misconduct constitute a pattern of conduct that is racketeering activity as proscribed by the Racketeer Influenced and Corrupt Organization Act?

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Royal Food Products, Inc.

Petitioner

versus

Buckeye Union Insurance Company
and others

Respondents

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Sixth Circuit

- -

PETITION FOR CERTIORARI

MAY IT PLEASE THE COURT:

Petitioner, Royal Food Products, Inc., prays that a writ of certiorari issue to reyview the judgment of the United States Court of Appeals for the Sixth Circuit entered January 13, 1993 and as confirmed by the order denying a rehearing en banc with the mandate issued on March 4, 1993.

CITATIONS TO OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals bears a stamp legend reading: "Not Recommended for Full-Text Publication" and, hence, is not reported.

Likewise, the opinions of the trial court have not been published.

The opinions appear in the appendix in their entirety.

JURISDICTION

The jurisdiction of the Court of Appeals for the Sixth Circuit was entered on March 4, 1993.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 [1].

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

These provisions will be found in the appendix.

STATEMENT OF THE CASE

This case was filed in the District Court of the Southern District of Ohio, Eastern Division, on January 31, 1991.

Petitioner's complaint contained 42 paragrapns, outlining the history on whicn the cause was predicated.

On August 9, 1988, the third floor of the building in which petitioner was a tenant collapsed. A water main burst in the course of the accident, flooding the first two floors of the building. Petitioner suffered damages to its equipment, food processing facility, inventory, furniture and records.

Petitioner's insuror, Buckeye Union Insurance Company, investigated the event and retained an eminent engineering firm to determine the cause of the accident. The report of the engineering firm placed the cause of the

collapse of the floor because of overloading of said floor by another tenant, Seasonings, Etcetera, Inc.

Ultimately, Buckeye paid $29,500 to petitioner, the limits of its liability on the insurance contract it had with petitioner.

Buckeye obtained as a condition of such payment a subrogation agreement from petitioner as required by the said insurance contract. Said subrogation agreement was to serve as a basis for Buckeye to recoup the funds it had paid petitioner from the person responsible for the damages.

State court litigation ensued in February, 1989, with three suits filed by parties impacted by the accident resulting in a consolidation of said cases.

Petitioner was a defendant in said suits and Buckeye assigned its house counsel to represent petitioner. Buckeye was also a party defendant in said litigation and it retained the firm of Lane, Alton & Horst to represent it.

In the meantime, the City of Columbus ordered the landlord of the premises to obtain an engineering opinion as to the condition of the structure. Such opinion was obtained and it stated that the building was sound and that the accident occurred because of the overload on the third floor.

A third engineering report was obtained by another insuror and the opinion of that report coincided with the other two opinions in placing the blame for the floor collapse on the overload caused by Seasonings.

One of the early depositions taken was done in the office of Lane, Alton & Horst, counsel for Buckeye. The witness was one of the owners of the building. It became very obvious at said deposition that Buckeye had adopted a view completely different from the engineers and that the building had major defects which caused the floor to collapse.

The landlord had pronounced Seasonings a trespasser for placing inventory on the third floor location to which it had no legal right to occupy.

The president of Seasonings, Florence Nay, was next deposed and she testified that she had rented said location; she produced a memo [unsigned by any party] which, she claimed, indicated that she had entered into a rental agreement with the landlord.

Her husband, her co-worker, tes-

tified in the same deposition session but he disavowed any knowledge of such rental arrangement.

The warehouse manager of Seasonings later testified that when he was faced with a glut of inventory, he obtained permission from another tenant, Ben's Best, Inc., to use space which had been leased to Ben's Best.

The principal of Ben's Best, David Watkins, was also deposed and he admitted that he had given the warehouse manager of Seasonings permission to store inventory leased by Ben's Best. The landlord then produced a copy of his lease with Ben's Best which strictly forbade any subletting of any space demised to Ben's Best.

Buckeye's house counsel, Timothy McCarthy, filed a timely answer in behalf of petitioner in the state court action. He was pressed by the president

of petitioner to take further action by way of a cross-claim which would be the basis whereby petitioner might recover the balance of its damages.

McCarthy's response was to obtain an order of the state court which withdrew petitioner's answer and dismissed petitioner out of the state court action.

At this point, petitioner concluded that Buckeye had placed itself diametrically at cross-purposes with its insured.

In all the depositions, counsel for Buckeye worked in tandem with other counsel representing interests adverse to petitioner.

Buckeye not only conducted itself in a fashion hostile to petitioner but, indeed, contrary to its own interests since Buckeye was acting in such fashion as would preclude any recovery by Buck-

eye of the subrogation funds it had paid petitioner.

Defendants filed motions in the district court to dismiss petitioner's complaint on the authority of Fed. R. Civ. P. 12[b][6].

Motions were also filed, seeking a more definite statement by petitioner and these motions were sustained. Petitioner's president supplied an affidavit, fortifying the more definite statement. A copy of said affidavit will be found in the Appendix herein.

Petitioner's president asserted under oath that Buckeye entered into a conspiracy with the other defendants in order to abort petitioner's claim. The American States Insurance Company had the greatest exposure for petitioner's damages. Because of the diligent work of Buckeye's counsel, Lane, Alton & Horst, in league with counsel for Amer-

ican States and for Seasonings, petitioner's president claimed that the collusion among these parties created an enterprise whose numerous aspects constituted a pattern of racketeering and corruption.

The District Court, in its October 28, 1991, decision, reaffirmed the motions seeking the more definite statement. Yet, beyond that, the trial court ignored the more definite statement and the affidavit of petitioner's president and sustained the motions to dismiss by an order filed October 29, 1991.

Despite the length of the petitioner's complaint and the extensive more definite statement, the trial court held that petitioner had not adequately described the venal acts of the defendants.

Defendants had also filed motions for sanctions and the trial court also

sustained those motions and awarded $5,592.50 in sanctions against counsel for plaintiff.

Petitioner filed for relief from judgment and, once again, petitioner's president offered another affidavit which outlined in gruesome detail the wrongdoings of Buckeye, its counsel and the other defendants. The trial court overruled said motion.

Thereafter, petitioner filed a timely appeal in the United States Court of Appeals for the Sixth Circuit.

After briefs were filed and oral argument held, the Circuit Court affirmed the trial court.

In the same fashion as the trial court, the Circuit Court relied on but one paragraph of the complaint in determining that the petitioner had failed to aver allegations adequate to maintain its cause of action. The Circuit Court

made no mention of the affidavits of petitioner's president.

Sua sponte, the Circuit Court ordered sanctions and remanded the cause to the trial court for determination of the amounts of such sanctions.

Petitioner filed an application for a rehearing en banc which the Circuit Court denied.

The mandate of the Circuit Court was issued on March 4, 1993.

ARGUMENT

I. Does not a highly constricted de novo review that ignores critical elements of the pleadings followed by a Rule 12[b]-[6] dismissal constitute a deprivation of the constitutional right to trial?

Despite the vigorous holdings of Conley v. Gibson, 355 U.S. 41 and Hishon v. Spalding, 467 U.S. 69, this case was dismissed without trial like an infant strangled in its cradle.

This court has emphatically held that such a dismissal was possible only if the court finds that it is apparent beyond a doubt that the plaintiff can prove no set of facts which would entitle him to relief.

Hishon held that dismissal would be affirmed only if "it is clear that no relief could be granted under any set of facts that could be proved consistent

with the allegations.

The brutal facts necessary to establish a RICO claim were set forth in this case in the complaint, followed by a More Definite Statement which was fortified by the affidavit of Petitioner's president.

The More Definite Statement which was demanded by some of the defendants was vigorously attacked by other defendants. The trial court overruled the motions to strike it. That should have been the happy circumstance of making the trial and circuit courts aware of its existence. Unfortunately, that was not the result. Both courts ignored its substance. The trial court ruled that the averments of the petitioner were inadequate, relying on one [1] paragraph of the 42 paragraphs in the complaint!

The Circuit Court likewise used but one paragraph of the complaint as

the basis for petitioner's claims. The More Definite Statement [to be found in its entirety in the Appendix herein] made, in summary, the following claims:

1. Petitioner's president, in his affidavit, outlined his relationship with T. Robert Blakely, one of the authors of RICO.

2. He described his involvement with other RICO cases wherein he had been retained as a consultant.

3. He set forth the details of his monitoring of the state court litigation involving his company.

4. He described the four expert engineering opinions, all of which concurred in the conclusion that the floor collapse as being caused by the overload created by Seasonings.

5. He expressed his amazement at the actions of counsel for Seasonings and the insurors as they attempted to

establish a defense posture at total variance with the known facts.

6. He demonstrated his surprise at the false testimony of witnesses appearing in behalf of Seasonings.

7. He indicated his outrage when counsel assigned to petitioner by Buckeye from their in-house staff traduced his client and attempted to destroy the basis on which petitioner might recover its damages.

8. He stated that Buckeye contravened the obligation it owed to its insured, the petitioner, and breached the contractual obligations incumbent upon Buckeye through the insurance policy it issued and from the subrogation agreement it had with petitioner.

9. He offers his knowledge as to the conspiracy between Buckeye and American States Insurance Company, the insuror for Seasonings, whereby Buckeye

would sacrifice petitioner in order to shield and shelter Seasonings and American States from their exposure in the case.

Despite Hishon and Conley, the trial court dismissed the action and awarded sanctions to the defendants. This decision may be likened to the circumstance whereby the sheriff brought in a horse thief and, in the ensuing trial, the judge decided that it was the sheriff who should be the one to be hanged.

A cursory review of the volumes of Federal Rules Decisions lists 15 to 25 decisions in each such volume referencing decisions touching upon Fed. R. Civ. P. 12[b][6]. The care and sensitivity of the vast majority of trial and circuit opinions in which said rule is a

major element demonstrate that Hishon and Conley are being followed by the lower courts.

That is not the case in the instant matter.

In that light, the action of the two lower courts that considered this case result in the inescapable conclusion that, absent a conscientious application of the rule enunciated in Hishon and Conley, the disastrous effect is to deprive petitioner of its "day in court." This is a constitutional right that must not be snuffed out as has happened herein.

Circuit court panels are not to emulate the three figures that preach "See no evil, hear no evil, speak no evil." If a court does not determine definitively that a litigant's pleadings clearly present no set of facts that would entitle him to relief, then the

constitutional right to a trial is extinguished. In this case, the circuit court opinion chose to see no evil even though the factual allegations were overwhelming both as to quantity as well as to the gravity of the wrongs committed by respondents.

Significantly, the historic figure signifying "see no evil" has its eyes covered. That is not permissible to a circuit court in the light of the rules clearly provided in Hishon and Conley.

II. Would not actions over a period of two years by a conspiracy among counsel as directed by their insurance company clients which demonstrate the use of perjury, fraud and other misconduct constitute such a pattern of racketeering activity as is prohibited by the Racketeer Influenced and Corrupt Organizations Act?

The primary acts which establish the predicate of the enterprise of the respondents may be described as follows:

1. The treachery of Timothy McCarthy in sabotaging his "client's" case at the behest of the insurance company for which he was in-house counsel.

2. The perjury of Florence Nay who claimed the right of tenancy whereas in fact, she and her company acted lawlessly in taking over warehouse space to which they had no right whatever.

3. The misconduct of Lane, Alton & Horst ["Lane"] and Crabbe, Brown, Jones, Potts and Schmitt ["Crabbe"] and Wirtz & Kohn ["Wirtz"] in traducing the truth of the four engineering experts and proceeding upon a course of total falsehood and fabrication.

4. The misconduct of Lane and Crabbe in deposing witnesses in a desperate attempt to slander the condition of the building wherein the tort occurred.

5. The misconduct of such counsel in seeking an ex parte conference with the state trial court after which conference, the state court judge decided to abort petitioner's right to be in the state action without any explanation whatever for such decision.

6. The wretched action by Buckeye Union Insurance Company in brutally breaching the contract with petitioner

and taking action to frustrate petitioner's attempts to recover the damages it suffered.

7. The economic suicide of Buckeye in its action which jettisoned the subrogation funds it had paid because Buckeye was prepared to sacrifice its $29,500 in order to protect American States from exposure to the losses of petitioner valued at about $400,000.00.

8. The flaming hypocrisy of the defendants who offered a defense of utter sophistry to the trial court, claiming that they had a right to suggest an "alternative causation" for the tort of August 9, 1988. The defendants, being insurance adjusters and attorneys, undertook to substitute their judgment for the four engineering reports which contained conclusions adverse to their interest.

In H.J., Inc. v. Northwestern Bell Telephone Company, 106 L.Ed. 2d 195, the final paragraph of the concurring opinion states as follows:

> " * * * I think the Court is correct in saying that nothing in the statute supports the proposition that predicate acts constituting part of a single scheme [or single episode] can never support a cause of action under RICO. Since the Court of Appeals here rested its decision on the contrary proposition, I concur in the judgment of the Court in reversing the decision below."

Petitioner claims that there was but one scheme in which the respondents were involved; that over a two year period, there was a long series of predicate acts designed to effect that scheme. Hence, under H.J., the petitioner need not and does not claim that respondents have been living a life of constant duplicity and wrongdoing. The enterprise herein which consisted of

false testimony, a horrendous example of malpractice, and the numerous other efforts seeking to destroy the rights and property of petitioner are adequate to maintain a RICO cause of action.

The law firms who are respondents may defend their conduct on the basis that they were not the managers or operators of the enterprise. However, under 18 U.S.C. 1962[c], there is no exception or exemption for participants even if they were not the primary moving parties in the enterprise.

Since said law firms are staffed with attorneys who know or should know the law, their willingness to cooperate in the scheme renders them equally liable with their clients for the wrongs that were perpetrated by them. This position was held in United States v. Scotto, 641 F.2d 47 [1980], which case states that the "conduct" element is

satisfied where "[1] one is enabled to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise or [2] the predicate offenses are related to the activities of that enterprise", cert. denied, 452 U.S. 961 [1981].

Scotto is supported and was followed in the holdings in United States v. Provenzano, 688 F.2d 194, 200 [3d Cir.], cert. denied, 459 U.S. 1071 [1982]; United States v. Yarborough, 852 F.2d 1522, 1544 [9th Cir.], cert denied, 488 U.S. 866 [1988]; United States v. Cauble, 706 F.2d 1322, 1333, [5th Cir., 1983]. Cauble, supra, clearly pointed out that the "conduct" element entails a showing, where the enterprise is a legitimate business, that [1] the defendant has in fact committed the racket-

eering acts as alleged; [2] the defendant's position in the enterprise facilitated his commission of the racketeering acts, and [3] the predicate acts had some effect on the lawful enterprise. Cert. denied, 465 U.S. 1005 [1985]. See also Bank of America v. Touche Ross & Co., 782 F.2d 966, 970 [11th Cir. 1986] which holds: "* * * 'conduct' * * * simply means the performance of activities necessary or helpful to the operation for the enterprise.

These cases integrate into a single inquiry the issue whether the defendant conducted or participated in the conduct of the enterprise's affairs and whether he did so "through" a pattern of racketeering activity. That approach is consistent with RICO's focus on the relationship between criminal

conduct and the enterprise. The nature and method of the defendant's crimes must be examined to determine whether he has "conducted or paticipated" in the conduct of the enterprise's affairs "through" the pattern of predicate crimes.

Thus, these cases provide enlightenment as to the critical term, "conduct" which is found in §1962[c]. Further illumination is derived from Sorenson v. Secretary of the Treasury, 475 U.S. 851, 860 [1986] and in King v. St. Vincent's Hospital, 112 S. Ct. 570, 574 [1991].

Interpretive guidelines for RICO were provided by this court in Russello v. United States, 464 U.S. 16, 21 [1983] and Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497-498 [1985].

Sedima says that "RICO is to be "read broadly" in accordance with "Con-

gress' self-consciously expansive language and overall approach".

RICO has proved to be a salutary exercize in legislative action. The case law has developed voluminously but it appears that such treatments may continue to be required.

However, applying these potent pronouncements to the case at hand, it appears powerfully persuasive that this matter should be remanded to the trial court for a merit hearing.

This Greek tragedy continues; the state court case still pends; the respondents have continued their depredations throughout this RICO case. Granting the writ in this cause would strike a mighty blow for justice.

CONCLUSION

The decision of the Circuit Court should be reversed and the matter remanded for trial.

APPENDIX

United States Court of Appeals
For the Sixth Circuit

No. 92-3201
January 13, 1993
Issued as Mandate March 4, 1993.

Royal Food Products, Inc.
Plaintiff-Appellant
v.
Buckeye Union Insurance Company;
Seasonings, Etcetera, Inc.;
American States Insurance Company;
Lane, Alton & Horst; Wirtz & Kohn;
Crabbe, Brown, Jones, Potts & Schmitt;
Timothy McCarthy; and Florence Nay
Defendants-Appellees

Before: Norris and Siler, Circuit Judges; and Edgar, District Judge

Per Curiam. Plaintiff-Appellant Royal Food Products, Inc. appeals the district court's order of dismissal and sanctions for Defendants-Appellees. The primary issue is whether the district court properly granted defendants'; motions to dismiss pursuant to Fed R. Civ. P. 12[b][6], based upon its finding that plaintiff failed to establish the requisite elements in its pleading under the Racketeer Influenced and Corrupt

Organizations Act ["RICO"]. For reasons stated hereinafter, we AFFIRM the judgment.

I.

Plaintiff was a tenant at 407 North Grant Avenue in Columbus, Ohio. Defendant Seasonings Etcetera, Inc. ["Seasonings"] occupied space in the same building on a floor above plaintiff. Plaintiff alleges that Seasonings was a trespasser, as it stored its inventory and equipment without paying rent. On August 9, 1988, the third floor of the building collapsed onto the second floor, fracturing a water main, which, according to the complaint, caused the flooding of the lower two floors. As a result, plaintiff alleged damage to its inventory, furniture and equipment in the sum of $450,000. Defendant Buckeye Union Insurance Company ["Buckeye"], the insurance carrier for

plaintiff, investigated these allegations, using outside experts to determine the cause of the collapse, and concluded that the weight of Seasoning's inventory caused the third floor to collapse. Buckeye paid plaintiff the policy limit of $29,500.

Plaintiff filed a four-count against Buckeye, American States Insurance Company ["American"], and their respective legal counsel: Lane Alton & Horst ["Lane"] and Wirtz & Kohn ["Wirtz"]. Plaintiff also named as defendants Crabbe, Brown, Jones, Potts and Schmitt ["Crabbe"]; Timothy McCarthy ["McCarthy"], an attorney employed by Buckeye; Seasonings, Florence Nay, an officer, director and shareholder of Seasonings and two unnamed persons.

Count I alleged RICO violations by all defendants. Count II alleged that Buckeye breached its fiduciary duty

owed to plaintiff as a result of its insurance contract with plaintiff. Count III sought treble damages under 18 U.S.C. § 1964[c]. Count IV requested that all licenses, franchises, and permits held by any of the defendants be cancelled pursuant to Chapter 2393 of the Ohio Revised Code.

On October 28, 1991, the district court granted defendants' motions to dismiss and for sanctions. Then, on November 12, 1991, plaintiff moved for relief from judgment pursuant to Fed. R. Civ. P. 60[b]. On January 27, 1992, the district court filed its opinion and order and set the specific dollar amount

of sanctions to be imposed against plaintiff's attorney. On February 20, 1992, plaintiff filed its notice of appeal.

II.

Whether the district court correctly dismissed a suit pursuant to Fed. R. Civ. P. 12[b][6] is a legal question subject to de novo review. Meador v. Cabinet for Human Resources, 902 F.2d 474, 475 [6th Cir.], cert. denied, 111 S.Ct. 182 [1990]. The court must construe the complaint in the plaintiff's favor, accept all factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his or her claims that would entitle him or her to relief. Id.

III.

Defendants argue that plaintiff filed an untimely appeal. However, though it is prima facie evidence that a decision or judgment has been made after the judge signs the document, Associated Press v. Taft-Ingalls Corp., 323 F.2d 114, 166 [6th Cir. 1963], here the district court could not enforce its judgment until after determining the sanction amount. See Budinich v. Becton Dickinson & Co., 486 U.S. 196, 199. [1988]. Thus, the decision did not become final until after the amount was determined. Id. Accordingly, plaintiff filed a timely appeal on February 20, 1992, from the district court's January 27, 1992, order.

The essence of plaintiff's conspiracy theory is contained in Count I, which alleges that

> [a]ll three insurance companies and their three law firms then

> joined togetner in a collusion and conspiracy to exculpate Seasonings and the Nays from the damages arising from the calamity caused by them. Buckeye had its 'in house' counsel, Timothy McCarthy, file an answer in the state court in [sic] behalf of plaintiff as part of the design to cripple plaintiff from any effort to pursue its claim.

Defendants argue, however, that a "pattern of racketeering activity" must be shown to impose civil or criminal RICO liability upon its violators, and that plaintiff has failed to allege factors which constitute a pattern under the RICO statutes. However, before the pattern requirement is considered, "racketeering activity" must be presented. 18 U.S.C. §1961. The district court found, and we agree, that only four sections have possible relevance to this case: [1] 18 U.S.C. §1503 [obstruction of justice]; [2] 18 U.S.C. §1512 [tampering with a witness, victim

or an informant]; [3] 18 U.S.C. § 1513 [retaliating against a witness, victim, or an informant]; and [4] 18 U.S.C. § 1957 [engaging in monetary transactions and property derived from specified unlawful activity].

First, it is a crime to "corruptly, or by threats of force, or by any threatening letter of communication, endeavor[] influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States." 18 U.S.C. §1503. In the present litigation, plaintiff has failed to allege any conduct on the defendants' part which would satisfy this definition of "racketeering activity."

Second, "racketeering activity" includes "knowingly us[ing] intimidation or physical force... with intent to cause or induce any person to withhold testimony . . . from an official pro-

ceeding." 18 U.S.C. §1512[b][2][A]. Additionally, "racketeering activity" includes "knowingly engag[ing] in any conduct and thereby caus[ing] bodily injury to another person or damag[ing] the tangible property of another person...with intent to retaliate against any person for" the attendance, testimony or taking part in an official proceeding. 18 U.S.C. §1513. In the present litigation, plaintiff has failed to allege improper influence over the state court proceedings adequate to constitute "racketeering activity."

Third, it is a crime to "knowingly engage[] or attempt[] to engage in a monetary transaction in criminally derived property that is of a greater value than $10,000." 18 U.S.C. §1957-[a]. In the present appeal, plaintiff has failed to allege any monetary transaction, particularly one containing

criminally derived proceeds. Plaintiff has failed to plead racketeering activity and, thus, we need not consider whether a racketeering pattern existed. For the above stated reasons, plaintiff has failed to state a claim upon which relief can be granted under RICO. Accordingly, the district court's dismissal pursuant to Fed. R. Civ. P. 12[b][6] is affirmed.

In Count III, plaintiff requested treble damages under 18 U.S.C. §1964. As it failed to state a claim upon which relief can be granted, plaintiff is not entitled to treble damages. Accordingly, the district court appropriately granted defendants' motion to dismiss Count III.

Count II and IV allege state law claims. As plaintiff's RICO claims have been dismissed, the next determination is whether jurisdiction is proper over

the remaining claims. "The district courts may decline to exercise supplemental jurisdiction over a claim under subsection [a] if...the district court has dismissed all claims over which it had original jurisdiction." 28 U.S.C. §1367[c][3]. As state law issues are best decided by state courts, the district court did not abuse its discretion in declining to invoke jurisdiction for those two counts.

Plaintiff argues that sanctions were improperly imposed. Upon a review of a district court's sanctions award, an appellate court applies an abuse of discretion standard. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 [1990]. "[T]he court is expected to avoid using the wisdom of hindsight and should test the signor's conduct by inquiring what was reasonable to believe at the time the pleading, motion or

other paper was submitted." INVST Fin. Group, Inc. v Chem-Nuclear Sys., Inc., 815 F.2d 391, 401 [6th Cir.] [quoting Fed. R. Civ. P. 11 advisory committee's note to the 1983 amendment], cert. denied, 484 U.S. 927 [1987]. The district court did not abuse its discretion, as it found that plaintiff had approximately two years in which to investigate its claims against defendants, stating: "[t]he plaintiff did not meet any single aspect of the RICO claims pled. Indeed, plaintiff did not even provide the appropriate allegations. There is no doubt that plaintiff utterly failed to plausibly justify its RICO claim."

Defendants argue that plaintiff's arguments on appeal are irrelevant, illogical, and factually misrepresented and, thus, this appeal is frivolous and sanctions should be imposed. Romala Corp. v. United States, 927 F.2d 1219,

1222 [Fed. Cir. 1991]. If the appellate court determines that an appeal is frivolous, it may award just damages and single or double costs if the appeal is indeed frivolous, unreasonable or without foundation. Wrenn v. Gould, 808 F.2d 493, K505 [6th Cir. 1987]. If an appellate's legal position is doomed to failure and an objectively reasonable litigant should have recognized this, the appeal is frivolous. Toscano v. Chandris, S.A., 934 F.2d 383, 387 [1st Cir. 1991]. Plaintiff's accusations are based on speculation and are not grounded in evidence or fact. As the arguments do not constitute a legitimate attempt to reverse the district court's decision, sanctions should be imposed. See Hartz v. Friedman, 919 F.2d 469, 474-475 [7th Cir. 1990]. Even though Wirtz is the only party to request an appellate sanction award, this court, sua sponte,

is awarding sanctions to all defendants against plaintiff's counsel. Fed. R. App. P. 38. Accordingly, this case is remanded to the district court to conduct a hearing to determine the proper amount and allocation of fees and costs. See NLRB v. Cincinnati Bronze, Inc., 829 F.2d 585, 591-592d [6th Cir. 1987].

Though plaintiff does not address the issue, defendants argue that Rule 60[b][6] cannot provide relief for legal error absent other exceptional or extraordinary circumstances. Hopper v. Euclid Manor Nursing Home, Inc., 867 F.2d 291, 294 [6th Cir. 1989]. We agree. Accordingly, the district court did not abuse its discretion in denying Plaintiff's motion for relief from judgment. Union Oil Co. v Service Oil Co., 866 F.2d 224, 227 [6th Cir. 1985].

Therefore, the judgment of the district court is AFFIRMED, and this matter is remanded for a determination and allocation of attorney's fees and costs on appeal.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Royal Food Products Co.

Plaintiff

vs Case No. C2-91-090

Buckeye Union Casualty Co., et al.,

Defendants

OPINION AND ORDER

Royal Food Products Co. ["Plaintiff"] filed a four count complaint on January 31, 1991, against Buckeye Union Insurance Co. ["Buckeye"], American States Insurance Company, ["American"], and their respective legal representatives; Lane, Alton & Horst ["Lane Alton"] and Wirtz & Konn ["Wirtz"]. Plaintiff also named as defendants; Crabbe, Brown, Jones, Potts & Schmitt ["Crabbe Brown"]; Timothy McCarthy ["McCarthy"], an attorney employed by Buckeye; Seasonings Etcetera, Inc. ["Seasonings"];

Florence Nay ["Nay"], an officer, director and shareholder of Seasonings; and two unnamed defendants. 1 [The court's footnotes will be found at the coclusion of the opinion.]

Count I of the complaint alleges violations of the Racketeer Influenced and Corrupt Organizations Act [RICO], 18 U.S.C. §1961 et seq. [1984] on the part of defendants Buckeye, Lane Alton, Crabbe Brown, American, Wirtz, McCarthy, Seasonings and Nay. Count II of the complaint alleges that Buckeye breached its fiduciary duty owed to plaintiff as a result of its contract of insurance with plaintiff. Count III seeks treble damages under 18 U.S.C. §1964[c]. Finally, Count IV of the complaint requests that all licenses, franchises and permits held by any of the defendants be canceled, pursuant to Chapter 2393 of the Ohio Revised Code.

Jurisdiction and venue in this case are based upon 18 U.S.C. §1965[a] [1984], which provides that [a]ny civil action or proceeding under this chapter against any person may be instituted in the district court of the United States or any district in which such person resides, is found, has an agent, or transacts his affairs."

This case is before the Court pursuant to numerous motions, namely, Crabbe Brown's Motion to Dismiss; Lane Alton's Motion for Sanctions; Lane Alton's Motion to Dismiss; Buckeye and McCarthy's joint Motion to Dismiss; American's Motion to Dismiss, Wirtz's Motion for Sanctions, Seasoning's and Nay's Joint Motion to Dismiss; Buckeye's and McCarthy's joint Motion to Strike Plaintiff's More Definite Statement; and Nay's, Seasonings's. American's and Crabbe Brown's Joint Motion for Sanc-

otions.

FACTS

On August 9, 1988, Plaintiff Royal Food Products was a tenant at 407 North Grant Avenue in Columbus, Ohio. Likewise, Seasonings occupied space in the same building on a floor above Plaintiff. Plaintiff alleges that although Seasonings was a tenant in those premises, it was trespassing upon a section of the floor that it occupied by storing its inventory and equipment on that portion of the third floor of those premises without paying rent for said space.

On or about August 9, 1988, the third floor of the building at 407 North Grant Avenue collapsed into the second

floor, fracturing a water main, which, according to the complaint, caused the flooding of the lower two floors. As a result of this flood, plaintiff has alleged damage to its inventory, furniture and equipment in the amount of $450,000.

Buckeye subsequently investigated these allegations, utilizing outside experts to determine the cause of the collapse. It is Buckeye's assertion that these experts concluded that the weight of Seasoning's inventory caused the third floor to collapse. Buckeye, as Plaintiff's insurer, paid Plaintiff the policy limits of $29,500.

After the accident, Plaintiff filed an action in state court alleging that the defendants had unsuccessfully attempted to produce evidence that the design, construction, and/or maintenance of the building was the cause-in-fact of

the collapse which occasioned plaintiff's damages. The state court action is still pending. In that action, the plaintiff further contends that the defendants have acted illegally in attempting to produce a theory of alternative causation which has continued throughout the state court proceedings.2

DECISION

As a preliminary matter, Defendants Buckeye Union and McCarthy have filed a joint Motion to Strike Plaintiff's More Definite Statement. In this motion, they assert that plaintiff should have filed a Memorandum Contra their Motion to Dismiss rather than a more definite statement. However, as several of these defendants, either directly or indirectly, have requested a more definite statement of the plaintiff and as these motions were granted on May

13, 1991, Defendants Buckeye Union and McCarthy's Motion to Strike is hereby DENIED.

Further, Defendants Buckeye Union and McCarthy urge that if plaintiff's more definite statement is considered, the Court should treat their motion to dismiss as a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. The Court also declines this invitation, as plaintiff was ordered to supply a more definite statement which had also been requested by several defendants. The Court will now turn its attention to the pending motions for dismissal and for sanctions.

I. Motions to Dismiss

A. RICO Claims

Motions to dismiss under Fed. R. Civ. P. 12[b][6] have been filed by Defendants Crabbe Brown, Lane Alton, Buckeye Union, McCarthy, American,

Wirtz, Nay and Seasonings. It is well settled that a district court may not dismiss a claim under rule 12[b][6] for failure to state a claim unless it is apparent beyond a doubt to the court that the plaintiff can prove no set of facts which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 [1957]. In determining whether the facts presented in a complaint support a claim upon which relief may be granted, the district court is to liberally construe the facts in the light most favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 [1974]; Jenkins v. McKeithen, 395 U.S. 411, 421 01969]; 5 C. Wright & A. Miller, Federal Practice and Procedure, §1357 at 594 [1969]. The essence of a court's inquiry is to determine whether the allegations contained in the complaint contain "a short

and plain statement of the claim showing that the plaintiff is entitled to relief." Fed. R. Civ. P. 8[a].

The operative allegations of County I, contained in paragraph 29 of Plaintiff's Complaint state that, "[a]ll three insurance companies and their three law firms then joined together in a collusion and conspiracy to exculpate Seasonings and the Nays from the damages arising from the calamity caused by them. Buckeye had its "in house" counsel, Timothy McCarthy, file an answer in the state court in [sic] behalf of plaintiff as part of the design to cripple plaintiff from any effort to pursue its claim.

Under the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. §1961 et seq., it is required that "a pattern of racketeering activity" be shown in order to impose civil or crimi-

nal liability upon those who violate its commands. Defendants, in their motions to dismiss, have stressed the lack of allegations which constitute a "pattern" under the RICO statutes.

However, before the requirement of a pattern can even be considered, there must be some "racketeering activity" present. "Racketeering activity" is defined by 18 U.S.C. §1961. Upon review of that lengthy definitional section, it is apparent that only four sections mentioned have possible relevance to this case:3 18 U.S.C. [1503 [relating to obstruction of justice]; 18 U.S.C. §1512 [relating to tampering with a witness, victim or informant; 18 U.S.C. §1513 [relating to retaliating against a witness, victim or an informant; and 18 U.S.C. §1957 [relating to engaging in monetary transactions de-

rived from specified unlawful activity]. These provisions will each be analyzed in turn.

28 U.S.C. §1503 [1984] makes it a crime to "corruptly, or by threats or force, or by any threatening letter or communication endeavor [] to influence, intimidate, or impede any grant or petit juror, or officer in or of any court of the United States." In the present litigation, including the pending state court action, the plaintiff has not alleged any conduct on the part of any of the defendants which would fall within this definition of "racketeering activity". Therefore, the conduct alleged by the plaintiff cannot be classified as "racketeering activity" under §1503.

It is also considered to be "racketeering activity under §1961 to "kill or attempt to kill," use "intimi-

dation or physical force," "threaten or corruptly persuade," or "intentionally harass another person with the intent to prevent that person from attending, testifying or taking part in an official proceeding." 18 U.S.C. §1512 [1991 Supp.] Likewise, whoever "knowingly engages in any conduct and thereby causes bodily injury to another person or damages the tangible property of another person with intent to retaliate" for attendance, testimony or taking part in an official proceeding, constitutes "racketeering activity" under §1961. 28 U.S.C. §1513. [1954]. In the present litigation, there has been absolutely no allegation of any such improper influence over the state court proceedings which would be sufficient to constitute "racketeering activity" under these sections.

Finally, 18 U.S.C. §1957 [1991 Supp.] makes it a crime to "knowingly engage[] or attempt[] to engage in a monetary transaction in criminally derived property that is of a value greater than $10,000." Once again, in the present litigation, there is absolutely no allegation by the plaintiff of any monetary transaction, much less one involving criminally derived proceeds. Therefore, §1957 cannot possibly be the basis for the plaintiff's claim of "racketeering activity".

As such, in the absence of an allegation of "racketeering activity", this Court shall not reach the issue of the existence of a pattern, as urged by the defendants. 4 Thus, plaintiff's failure to plead even the most basic requirement of a RICO violation, racketeering activity, makes it clear that there is no conceivable set of facts

which plaintiff could prove which would entitle it to relief. For the reasons stated above, it is clear that plaintiff has unequivocally failed to state a claim upon which relief can be granted under the RICO statutes. Accordingly, defendants' motions to dismiss Count I of Plaintiff's Complaint under rule 12[b][6] are hereby GRANTED.

In Count III of its complaint, plaintiff requests treble damages under §1964. If plaintiff cannot state a claim upon which relief can be granted due to its completely inexcusable failure to allege the basic element of "racketeering activity", as required under RICO, plaintiff is surely not entitled to treble damages for a violation of those statutory provisions. Accordingly, defendants' motions to dismiss Count III of plaintiff's complaint are hereby GRANTED.

B. Breach of Fiduciary Duty

Count II of the plaintiff's complaint alleges that Defendant Buckeye breached its fiduciary duty owed to the plaintiff which it assumed by virtue of its contract of insurance with the plaintiff. Since plaintiff's RICO claims, upon which jurisdiction and venue were based, have been dismissed, it must be determined whether this Court has jurisdiction over the remaining claims made by the plaintiff in this action. As this action was instituted in federal court on January 31, 1991, jurisdiction of the remaining claims is governed by the new supplemental jurisdiction statute, 28 U.S.C. §1367 [1991 Supp.]. 5 Subsection [a] of that statute provides, in pertinent part, as follows:

> in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental

> jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

Id.

Thus, in order to determine whether this Court has supplemental jurisdiction over the plaintiff's claim of breach of fiduciary duty, it must be determined whether that claim is so related to the RICO claims that it is part of the same "case or controversy" for the purposes of Article III, "plaintiff's claims [must be] such that he would ordinarily be expected to try them all in one judicial proceeding." Mine Workers v. Gibbs, 383 U.S. 715, 725 [1965]. Since the alleged breach of fiduciary duty arose out of the same set of facts as the alleged RICO claim, the plaintiff might be expected to try them

all in the same judicial proceeding. Therefore, the claim of breach of fiduciary duty constitutes part of the same "case or controversy" and is within the supplemental jurisdiction of this Court, pursuant to §1367.

However, subsection [c] of §1367 provides that "[t]he district courts may decline to exercise supplemental jurisdiction over a claim under subsection [a] if...[3] the district court has dismissed all claims over which it has original jurisdiction." Since the RICO claims have been dismissed, this Court shall consider whether to exercise its supplemental jurisdiction over the remaining claim.

The plaintiff's claim for breach of fiduciary duty is based upon the contract of insurance between the plaintiff and Defendant Buckeye. As matters of state contract law are best decided

by state courts, this Court will defer to the judgment of those state courts on matters of state contract law. Accordingly, this Court declines to exercise its supplemental jurisdiction over the plaintiff's claim for fiduciary duty. Therefore,. defendants' motions to dismiss Count II of the plaintiff's complaint are hereby GRANTED.

C. Revocation of Licenses under Chapter 2393 of the Ohio Revised Code.

In Count IV of its complaint, the plaintiff requests that statutory sanctions contained in Chapter 2923 of the Ohio Revised Code, including cancellation of all franchises, licenses and permits held by any of the defendants, be imposed. Regarding the application of the supplemental jurisdiction statute to this claim, it should be evident that the analysis is nearly identical to that

previously discussed, with the addition that the interpretation of state statutes is further within the province of state courts than is the development and elucidation of state contract law. Therefore, for similar reasons to those previously addressed, this Court declines to exercise its supplemental jurisdiction over the plaintiff's statutory claim. Accordingly, defendants' motions to dismiss Count IV of the plaintiff's complaint are hereby GRANTED.

II. Motions for Sanctions

A. Rule 11

The final issue before this Court is the request for sanctions by Lane Alton and Wirtz under Rule 11 of the Federal Rules of Civil Procedure. Federal Rule of Civil Procedure 11, as amended, provides in pertinent part as

follows:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion or other paper; that to the best of the signer's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Fed. R. Civ. P. 11 [1991 Supp.]. In utilizing this rule, it must be borne in mind that the central goal of Rule 11 is deterrence. Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447, 2454 [1990]. The Advisory Committee Notes to the rule state that "[t]he new language stresses the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule." They further state that "[t]he standard is one of reasonableness under the circumstances" and that

"[t]his standard is more stringent than the original good faith formula and thus it is expected that a greater range of circumstances will trigger its violation." The factors to be considered in determining whether reasonable inquiry has been made include:

> the time available to the signor for investigation; whether the signor had to rely on a client for information as to the facts underlying the pleading, motion or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether the signor depended on forwarding counsel or another member of the bar.

Century Products, Inc. v. Sutter, 837 F.2d 247, 250-251 [6th Cir. 1988] [citation omitted]. However, this circuit has adopted the view of the Advisory Committee that "[t]he court is to avoid using the wisdom of hindsight and should test the signor's conduct by inquiring as to what was reasonable to believe at the time the pleading, motion, or other

paper was submitted." INVST Financial Group v. Chem-Nuclear Systems, 815 F.2d 391, 401 [6th Cir, 1987][quoting Fed. R. Civ. P. 11 Advisory Committee's note to the 1983 Amendment]. Thus, an objective standard of reasonableness must be the measure of counsel's behavior. Century Products, 837 F.2d at 251, 253.

Should the court find that these standards of conduct have been violated, Rule 11 provides that

> the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the pleading, motion or other paper, including a reasonable attorney's fee.

Fed. R. Civ. P. 11 [emphasis added]. The mandatory word "shall" is intended to remove the exercise of the discretion by the court in imposing Rule 11 sanctions once it has imposed a violation. Davis v. Crush, 862 F.2d 84, 88 [6th Cir

1988]. Even though the court is bound to impose sanctions, the nature and amount of the sanctions may vary, depending upon the severity of the misconduct. Albright v. Upjohn Co., 788 F.2d 1217, 1222 [6th Cir 1986].

The plaintiff did not meet any single aspect of the RICO claim pled. Indeed, plaintiff did not even provide the appropriate allegations. There is no doubt that plaintiff utterly failed to plausibly justify its RICO claim. As a result, this Court must determine whether there was compliance with the strictures of Rule 11. Turning to the factors set forth in Century Products, supra, the Court notes that, although the record is not clear when the state court action was initiated, the incident which spawned that litigation occurred on August 9, 1988. Thus, more than two years was available to investigate the

tenability of a RICO claim. Thus, though ample time was available, plaintiff clearly did not make wise use of it.

The second factor to be considered in evaluating a motion for sanctions under Rule 11 is whether the signor was forced to rely on the client for information. As pertains to plaintiff's RICO claims, most of the alleged wrongful conduct by the defendants was witnessed by plaintiff's counsel and the state trial judge during the course of the state court proceedings, yet no appropriate action was taken there.

Third, as discussed supra, plaintiff's allegations under RICO do not meet even the most basic criteria necessary to maintain an action under that statutory framework. Therefore, plaintiff's complaint cannot have been based upon a plausible view or analysis of the law.

Finally, plaintiff was not dependent on forwarding counsel or another member of the bar in bringing the present action. Thus, it appears that all of the factors enunciated in Century Products points in favor of the defendants. Accordingly, this Court finds a clear violation of Fed. R. Civ. P. 11. The plain language of Rule 11 is clear in imposing a mandatory duty on this Court to impose sanctions in this instance.

The remaining question goes to who should bear the cost of this Rule 11 violation. This Court again notes that the instant litigation was commenced under the RICO statutes. These statutes are, at best, difficult to interpret, being both civil and criminal in nature. There has been much confusion and debate over RICO's provisions. Thus, this Court is of the opinion that a working

knowledge of RICO is beyond the ken of most of the general public and unlikely to be initiated by a layman. Therefore, it is plausible, indeed likely, that the present litigation was initiated at the behest of plaintiff's counsel. Accordingly, the duties of Rule 11 are imposed upon plaintiff's counsel. While the Court is mindful of the complexities of the RICO statutes, a cursory review of §1961 would have clearly revealed the total absence of any demonstrated racketeering activity. Furthermore, it is a dubious assertion to state that defense of alternative causation, which is often under taken by defense counsel, constitutes a threat of continuing criminal activity sufficient to sustain a RICO action. This is precisely the type of neglectful conduct which Rule 11 is designed to deter.

Accordingly, a violation of Rule 11 having been found, Defendants Lane Alton, Wirtz, Nay, Seasonings, American and Crabbe Brown's Motions for Sanctions are hereby GRANTED. Each of those defendants is hereby ordered to submit an affidavit of itemized costs to the Court within fifteen [15] days of this order, so that a determination of a reasonable sanction may be made.

CONCLUSION

To summarize: Buckeye and McCarthy's joint Motion to Strike Plaintiff's More Definite Statement is DENIED; the Motions to Dismiss filed by Crabbe Brown, Lane Alton, Buckeye and McCarthy, American, Wirtz and Seasonings and Nay are GRANTED; and the Motion for Sanctions filed by Lane Alton, Wirtz, Seasonings, Nay, American and Crabbe Brown are GRANTED.

IT IS SO ORDERED.

George C. Smith, Judge

United States District Court

FOOTNOTES TO THE COURT'S OPINION

1 For purposes of clarification, the Court notes that Plaintiff withdrew its complaint as to Nationwide Insurance Company on April 10, 1991. However, Crabbe Brown, its legal representative remains a party defendant.

2. Even though the state court action is still pending, the Court finds that abstention is not warranted because, in order for a federal court to abstain under the doctrine of Younger v. Harris, 401 U.S. 37 [1971], three elements must coalesce: first, there must be ongoing state judicial proceedings; second, the proceeding must involve important state interests; and third, there must be an adequate opportunity in the state proceedings to raise constitutional claims. See Middlesex Ethics Comm. v. Garden State Bar Ass'n., 457 U.S. 423, 432 [1982]. In the instant case, although the first and third requirements for federal court abstention, on going state judicial proceedings and an opportunity to raise federal claims in state court, the second element, involvement of an important state interest, is lacking in this case. Those state interests involved in this case, breach of fiduciary duty under a contract of insurance and revocation of licenses under Chapter 2923 of the Ohio Revised Code, are insufficient to warrant abstention.

3 The remainder of the statutorily prohibited activities which constitute "racketeering activity" under §1961 include such activities as murder, kidnapping, bribery, embezzlement, fraud, dealing in obscene materials, illegal gambling businesses, interstate transportation of stolen motor vehicles and dealing in narcotics are clearly outside the scope of the "racketeering activity" asserted by the plaintiff in this case,. and therefore need no further consideration by this Court.

4 In H.J., Inc. v Northwestern Bell Tel. Co., 492 U.S. 229, [1989], the United States Supreme Court clarified the pattern requirement, stating "[t]he term 'pattern' itself requires the showing of a relationship between the predicates and the threat of continuing activity. It is this form of continuity plus relationship which combines to form a pattern." Id. at 239. [citations omitted] [emphasis in original]. In the present litigation, no predicate acts have been alleged, so no relationship can exist between them. Furthermore, in order for there to be continuity, there must be "a threat of continuing racketeering activity." Id. at 240. Again, there can be no continuation of racketeering activity, as there is no showing of previous racketeering activity. Thus, plaintiff has also failed to allege the required existence of a pattern of racketeering activity, as required by §1962.

5 The historical notes to §1367 state that "this section shall apply to civil actions commenced on or after ...[Dec. 1, 1990].

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

Royal Food Products, Inc.

Plaintiff

vs Case No. C2-91-090
Judge Smith

Buckeye Union Insurance Co., et al.,

Defendants

AFFIDAVIT OF JOHN A. BERNARD

John A. Bernard, being first duly sworn according to law, states and deposes as follows:

1. Deponent is the president of plaintiff corporation.

2. Deponent has served as a corporate executive in various companies for thirty two years.

3. About six or seven years ago, deponent became acquainted with T. Robert Blakey, a law professor at the University of Notre Dame.

4. Dr. Blakey had been engaged in the research and writing that was considered by the committee of the U.S. Congress in enacting the Racketeer Influenced and Corrupt Organization statutes ["RICO"].

5. Deponent took a great interest in Dr. Blakey's work and had extensive discussions with him concerning "RICO".

6. A few years later, when deponent was involved as a consultant with a food processing corporation in the Harrisburg, Pennsylvania area,deponent became acquainted with one George Gekas, then and still a member of Congress and a partner in the firm of Mellman, Gekas and Foreman in Harrisburg.

7. Mr. Gekas was then involved in a RICO action against parties who were involved in food manufacturing, processing and distributing food products.

8. Deponent was retained by Mr.

Gekas as a consultant with respect to said RICO action.

9. Deponent served as a consultant to Rains International, Inc., ["Rains"] and was closely involved in a RICO action filed by the eminent law firm of Shea, Gould, counsel to Rains in an action against the Helmsley Corporation and Harry Helmsley.

10. Deponent further states that as president of plaintiff,. he closely monitored all of the activities of discovery undertaken in the actions pending in the Franklin County Common Pleas Court, Case No. 89CV-02-1109.

11. Deponent was closely involved with the agent who placed the insurance coverage with Buckeye Union Insurance Company ["Buckeye"] for plaintiff.

12. Said agent, Nicholas C. DeFusco of the firm of O'Brien, Michael and DeFusco, played an important in

reviewing said coverage in the light of plaintiff's losses as a consequence of the collapse of the floor caused by an overload of inventory belonging to Seasonings, Etcetera, Inc. ["Seasonings"].

13. In due course, deponent negotiated the proceeds due plaintiff from its losses and deponent executed a subrogation agreement with Buckeye so that Buckeye could recover the funds paid plaintiff under said agreement.

14. Deponent has followed all the crucial events connected with such state court litigation, the depositions being taken, the report of expert engineers and all other elements in the development of the cause.

15. Deponent was particularly elated when he reviewed the report of the highly reputed engineering firm retained by Buckeye which held that the overload of the inventory of Seasonings

was the cause of the floor collapse.

16. Deponent became irked when Buckeye assigned Timothy McCarthy, its house counsel, to represent plaintiff because Mr. McCarthy refused to take action in behalf of his "client", the herein plaintiff.

17. Ultimately, Mr. McCarthy sought and obtained an order from the state court that eliminated plaintiff from the pending actions and extinguished the basis and platform by which plaintiff could recover the balance of its losses.

18. In the meantime, deponent was surprised and amazed as he obtained reports that the attorneys for Buckeye were undertaking a course of action designed to place the liability for the accident upon the building rather than on Seasonings.

19. Deponent, in the light of the

actions of Buckeye, Seasonings, American States Insurance Company and their counsel, was amazed that said parties were working steadfastly to develop a basis totally at variance with the facts of the matter.

20. Finally, deponent, at a conference with plaintiff's counsel in September, 1990, offered the view that a conspiracy was afoot and that a corrupt program was being conducted to deprive plaintiff of its rights and to frustrate the ends of justice.

21. A month later, deponent requested of plaintiff's counsel that he research the RICO laws and cases impacted by those laws to see if an action would lie in federal court.

22. Plaintiff's counsel reported his research results but advised deponent that RICO litigation would be a very difficult burden under the circum-

stances.

23. Deponent continued to urge plaintiff's counsel to file such an action and, finally, said litigation was instituted in January, 1991, four months after it was proposed by deponent.

24. Deponent has had an extended involvement with RICO and, while not an attorney, deponent holds the firm opinion that the ends of justice are being frustrated by the parties enumerated above and their attorneys.

25. Deponent believes that it was totally corrupt for Buckeye to foreswear their chance to recover the proceeds it paid plaintiff and to use house counsel to cripple plaintiff's chances to recover the balance of its losses.

26. Deponent believes that a corrupt organization was developed by Buckeye, Seasonings, the Nays and their attorneys to fabricate a totally false

theory as to the cause of the tort in order to protect the Nays and their insurance company, American States.

Further, deponent saith naught.

/s/ John A. Bernard

Sworn to before me and subscribed in my presence this 8th day of November, 1991.

/s/ Theodore R. Saker

Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Royal Food Products, Inc.

Plaintiff

vs Case No. C2-91-090
Judge Smith

Buckeye Union Insurance Co., et al.,

Defendants

PLAINTIFF'S MORE DEFINITE STATEMENT

Plaintiff agrees to the motion of defendants Buckeye Union Insurance Company ["Buckeye"] and Timothy McCarthy ["McCarthy"], seeking a more definite statement which is offered herewith.

SWORN STATEMENT

BY JOHN A. BERNARD

PRESIDENT, ROYAL FOOD PRODUCTS, INC.

State of Ohio

County of Franklin, §§

1. When plaintiff was named in the state court action as a party in interest, Buckeye Union assigned the legal representation of plaintiff to an attorney employed by Buckeye, Timothy McCarthy.

2. McCarthy wrote a letter to plaintiff's principals, cautioning them against discussing the case with any person not authorized by Buckeye.

3. McCarthy filed an answer in behalf of plaintiff in the state court action but took no steps whatever to assert the claims of plaintiff against the tort feasors whose actions had seriously damaged plaintiff.

4. In December, 1989, McCarthy, the attorney employed by Buckeye, then filed a motion to dismiss plaintiff from said state court action, performing said act without the knowledge and without the consent of plaintiff.

5. In the meantime, Buckeye retained an eminent engineering firm that did an exhaustive study of the premises where the tort was perpetrated.

6. Said engineering firm was unaware that the persons who committed the tort were total trespassers into the warehouse area where the tort occurred.

7. Said engineering firm offered its considered and professional opinion that the collapse of the floor at said warehouse was due to the overloading of said floor by defendant Seasonings, Etcetera, Inc. ["Seasonings"]

8. Said engineering firm also indicated that the landlord should have provided signs advising as to the appropriate load for the subject floors; however, the landlord could not reasonably be expected to post such signs in an area into which Seasonings was an unmitigated trespasser.

9. In the meantime, Buckeye was named a defendant in said state court action.

10. Buckeye retained the firm of Lane, Alton & Horst to represent it in said state court action.

11. In the course of depositions of the landlords, counsel for Buckeye vigorously attempted to blame the floor collapse upon various other causes but not because of the overload of the floor by Seasonings. Buckeye and its counsel then filed its claim, not against Seasonings whose principals had caused the floor collapse, but against the landlords; this, despite the most reliable engineering and scientific evidence that the landlords or the building were not at fault.

12. In the course of depositions of other witnesses, Buckeye and its counsel continued to try and focus the

cause of the floor collapse upon an possible cause other than the overload by Seasonings.

13. Buckeye and its counsel worked steadfastly with counsel for Seasonings and the other defendants in order to try to eliminate Seasonings from blame for the floor collapse.

14. Buckeye and its counsel were aware that the City of Columbus Building Department had promptly investigated the floor collapse and demanded a study and opinion from another highly reputable firm as to the condition of the building.

15. The second firm performed its study and later issued an opinion that the cause of the floor collapse was attributed to the overload caused by the owner of the merchandise stored in the area where Seasonings had trespassed.

16. American States Insurance Company ["American] another insuror, retained the firm of Wirtz and Kohn in the campaign to frustrate the efforts of plaintiff to assert its claims.

17. The head adjuster of American States attended various deposition sessions which attendance demonstrated the importance of the state court action to American.

18. Wirtz & Kohn joined with other defendant counsel in all discovery efforts seeking to rebut and belie the engineering reports as to the causation for the floor collapse.

119. Nationwide Insurance company and its counsel, Crabbe, Brown, Jones, Potts & Schmitt, pursued the same course of action.

20. At one point, Nationwide and its counsel deposed the son of one of the landlords of the subject warehouse

and attempted by extensive examination to extract from said witness some culpability on the part of the building for the floor collapse.

21. Buckeye was the insuror of plaintiff under a contract which ultimately caused Buckeye to pay approximately $29,000 to plaintiff for those losses covered by the insurance policy.

22. Under said insurance contract, plaintiff was obliged to cooperate fully with Buckeye under a subrogation agreement required by the policy.

23. Said policy further provided that buckeye and plaintiff would further cooperate to protect each other;s interest.

24. The scientific principles of engineering studies and laboratory tests as accomplished by various engineering

firms clearly indicated to the defendants that Seasonings alone was responsible for the collapse of said floor.

25. Despite the evidence as demonstrated by the engineering studies and laboratory tests, the defendant companies and their defendant law firms concocted a false, untrue and fallacious basis for contravening the obvious facts of the case.

26. The defendants conspired so as to attempt to obtain totally unprobative evidence that would shield Seasonings, its principals and its insurors from liability in the premises.

27. The transcripts of the depositions taken for defendants by their counsel demonstrate beyond the peradventure of a doubt but that the conspiracy organized by the collusion among all of the defendants was steered by them in such fashion as would best serve the

interests of said defendants. This course was steadfastly followed despite the facts of the case repeatedly demonstrating the perfidy of such conduct.

28. The reports of the five, preeminent engineering firms and scientific research organizations were ruthlessly ignored by defendants in their campaign to frustrate the facts and suborn the truth for their unlawful purposes.

Further, deponent saith naught.

/s/ John A. Bernard, president
Royal Food Products, Inc.

Sworn to before me and subscribed in my presence this 18th day of March, 1991.

Sandra M. Bernard, Notary Public

IN THE UNITED STATES COURT OF APPEALS

SIXTH CIRCUIT

Royal Food Products, Inc.

Appellant

vs No. 92-3201

Buckeye Union Insurance Co., et al.

Appellee

Judge Norris, presiding
Judge Siler
Judge Edgar

MOTION TO SUPPLEMENT THE RECORD

Appellant moves to supplement the record in this cause.

Theodore R. Saker LPA
Supreme Court No 23293
750 South Front Street
Columbus OH 43215
Ph 614/443-3033
Attorney for Appellant

MEMORANDUM

As the court is aware, the underlying facts and events occurred in the course of a state court action. Such action has not yet been tried but the events associated with said action con-

tinue to occur.

The most recent event occurred in the past week, culminating in the filing of a pleading in the Supreme Court of Ohio. Said filing is extremely relevant to the herein cause and should be considered in the course of the disposition of the within appeal.

For that reason, appellant urges the court to sustain this motion and allow the record of this cause to be supplemented with said filing, a copy of which is attached hereto.

Respectfully submitted,

/s/Theodore R. Saker LPA

Attorney for Appellant

CERTIFICATE OF SERVICE

A copy of the foregoing was served upon Crabbe, Brown, Jones, Potts and Schmitt, 500 S. Front St., Cols OH 43215, attorneys pro se; Lane Alton &

Horst, 175 S. 3d St, Cols OH 43215, attorneys pro se; David Wirtz, 6500 Busch Blvd, Cols OH 43229, attorney pro se,and Thomas J. Keener, 115 West Main, Cols OH 43215, attorney for Buckeye Union Insurance Company.

/s/ Theodore R. Saker

IN THE SUPREME COURT OF OHIO

In the Matter of the
Disqualification of Judge
Patrick M. McGrath of the
Common Pleas Court of Franklin County, Ohio.

AFFIDAVIT OF DISQUALIFICATION

Royal Food Products, Inc., ["Royal"] makes this affidavit for the disqualification of Judge Patrick McGrath to preside at the trial of these cases.

Said party acts under favor of §2701.03, Revised Code.

Deponent herein served as president of Royal at all times relevant to the facts stated herein and makes this affidavit on his personal knowledge of said facts of this case as follows:

1. Royal is a food processing commercial enterprise, existing as an Ohio corporation for profit and its physical assets and other property were insured under a policy issued by Buckeye Union Insurance Company. It was located at the same building at 407 North Grant Avenue, Columbus, Ohio 43215.

2. Several weeks prior to August 8, 1988, defendant Seasonings received inventory in excess of the capacity of the warehouse space leased by Seasonings in a large building located at 407 North Grant Avenue, Columbus Ohio 43215.

3. The warehouse manager of Seasonings, one Tom Teague, asked David Watkins, principal of a neighboring

tenant, Ben's Best, Inc., if Teague might use some of the warehouse space leased to Ben's Best to store inventory of Seasonings.

4. The lease between Ben's Best and Grant Avenue Properties Company, the plaintiff/owner of the subject building, forbade any subleasing without consent of the owner obtained in advance in writing.

5. Neither David Watkins of Ben's Best nor Tom Teague of Seasonings obtained such consent from plaintiff/owner.

6. Seasonings then moved an enormous amount of inventory into the space in the northeast corner of the third floor of said building.

7. Such invasion of the Ben's Best space by Seasonings was a trespass and, as such, an unlawful act.

8. In the early morning hours of

August 9, 1988, the floor at said northeast corner of the subject building illegally occupied by the Seasonings inventory collapsed under the weight of such inventory.

9. The collapse of the floor ruptured a five-inch water main which resulted in the flooding of the building. The accident was not discovered until several hours later, by which time, the flooding of the building had done tremendous damage throughout the building both to the physical structure as well as various kinds of office equipment, records and business furniture belonging to various tenants.

10. Royal was one of the tenants of said building and had a lease for a substantial amount of space on the first and second floor of said building.

11. Royal's damages were calculated to be in the sum of $124,000.00.

Only a portion of its losses were covered by its insurance policy with Buckeye.

12. Buckeye paid Royal the sum of $29,500.00 under said policy and took back a subrogation agreement from Royal signed by the herein deponent, John A. Bernard. Said subrogation agreement required Royal to act in compliance with all of Buckeye's demands and directions in order that Buckeye could best recover the subrogation amount paid Royal.

13. The cases listed in the caption were filed by various parties, among them being various insurance companies seeking to collect on subrogation agreements which they obtained from other tenants to whom they had paid funds for the damages caused the other tenants. The court ordered consolidation of all of the said cases.

14. Buckeye assigned an employee,

Timothy McCarthy, house counsel for Buckeye, to become attorney of record for Royal. McCarthy filed pleadings in this litigation on behalf of Royal. Buckeye chose the law firm of Lane, Alton & Horst to represent it in this litigation.

15. In depositions, investigations and other pre-trial discovery, deponent came to the conclusion that the insurance companies had organized an enterprise whereby all blame for the collapse of the floor would be put on the plaintiff/owner of said building.

16. Royal, in its own discovery efforts and based upon expert witnesses retained from highly respected engineering firms, concluded that the collapse of the floor was caused by the overloading of inventory by Seasonings. Buckeye and the other insurors obtained reports of expert witnesses from engi-

neering firms which concurred in that finding.

17. Royal further concluded that Buckeye was perpetrating a defalcation on the subrogation agreement, that it was part of the enterprise with other insurors in the effort to blame the owner of the building and that its employee and house counsel, McCarthy, was obediently doing the bidding of his employer, Buckeye, and acting in hostile contravention of the claim of Royal.

18. McCarthy then filed a motion to dismiss Royal from this litigation. Royal protested such action would effectively deprive Royal of its right and opportunity to pursue its claim against Seasonings.

19. Judge McGrath sustained the motion and dismissed Royal from this litigation.

20. Royal promptly obtained the

services of another attorney who filed a motion under rule 60 [b] of the Ohio Rules of Civil Procedure for an order that would set aside the dismissal order and grant leave to Royal to file a counterclaim in behalf of its claim.

21. Judge McGrath sustained said motion and Royal filed its counterclaim.

22. All notices, court orders, notices of depositions and other paraphernalia issued by the court, its clerk and other counsel included, among the lawyers to be served with such notices and orders, the attorney for Royal who was clearly identified as the "Attorney for Royal Food Products".

23. A status conference was called by the court to be held on Friday, December 18, 1992, at 09:30.

24. Said status conference was held in the jury room of Courtroom 7C of the Common Pleas Court of Franklin

County, Ohio.

25. Early in said conference, Charles Brown, one of the attorneys representing Seasonings, suggested to the court that Judge McGrath meet separately with each group of attorneys.

26. Judge McGrath agreed to the suggestion.

27. Numerous conferences were held, one after the other, by the judge meeting separately and in sequence with the various parties and their counsel.

28. Royal, through its principals and attorney, finally met with the judge about 11:30 a.m., having no knowledge as to what Judge McGrath was told by the other parties or their counsel.

29. Royal's representatives were surprised when Judge McGrath suddenly and promptly announced that Royal was not a party to the case.

30. The Royal principals and its

counsel immediately provided to Judge McGrath the history of the litigation as to Royal being dismissed but that it was later readmitted to the case by Judge McGrath.

31. The judge then indicated that if Royal were a party to the case, it should not be a party and that he made a mistake when he allowed Royal back into the case.

32. The judge clearly indicated that Royal would be excluded from the litigation.

33. Deponent states that Royal cannot refile its claim because it faces the challenge arising from the tolling of the statute of limitations.

34. Judge McGrath offered no reason, basis, excuse or rationale why he felt that Royal was not or should not be a party or for his intention to exclude Royal from the litigation.

35. This cause is set for trial on Monday, January 4, 1993, and Royal has hastened to offer this document on the first business day following Judge McGrath's announcement concerning the exclusion of Royal from the case.

36. Deponent states that Judge McGrath has demonstrated a clear bias and prejudice against Royal by his announcement that Royal is to be excluded from said litigation.

37. Royal has suffered damages that have continued since the first computation and now amount to more than $100,000. Royal was in no way involved in causing said accident which occurred through no fault of any person related to Royal. Royal insists it is entitled to have its day in court.

38. Royal has been the subject of enormous depredations by other parties and their counsel which led Royal to

seek relief in federal court.

39. In an argument of the federal case in the United States Court of Appeals for the Sixth Circuit, Royal's counsel told of the treachery of Timothy McCarthy who acted to destroy Royal's rights in accommodation of the enterprise in which his employer was the leading party.

40 Buckeye's attorney, Franklin Eck of Lane, Alton & Horst, responded by telling the court that even if McCarthy had taken action to dismiss Royal, the successor attorney later retained by Royal promptly got Royal reinstated in the litigation so that Royal had not been harmed by McCarthy's conduct which contravened the interest of McCarthy's client.

41. It now appears that Judge McGrath proposes to nullify what Mr. Eck told the Sixth Circuit and Judge McGrath

proposes to reimplement the conduct of McCarthy and his employer, Buckeye, to destroy the rights and claims of Royal.

42. Accordingly, under favor of Section 2701.03 of the Revised Code, deponent respectfully suggests that Judge McGrath has by his conduct shown such bias and prejudice in favor of Buckeye and its allies and he should be disqualified from this litigation. That if Judge McGrath is permitted to continue on his announced course of conduct, the constitutional, statutory and common law rights of Royal will suffer extinction.

Further deponent saith naught.

/s/ John A. Bernard

Sworn to before me and subscribed in my presence this 21st day of December, 1992.

/s/ Sandra M. Bernard

Notary Public

FILED
Feb 24 1993
Leonard Green, clerk

No. 92-3201

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Royal Food Products Co.

Plaintiff-Appellant

vs ORDER

The Buckeye Union Insurance Co. et al.

Defendants

Before: Norris and Siler, Circuit Judges; and Edgar*, United States District Court Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

Entered by Order of the Court

/s/ Leonard Green, Clerk

Hon. R. Allan Edgar sitting by designation from the Eastern District of Tennessee

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution:

AMENDMENT [V]

[RIGHTS OF PERSONS]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statutory Provisions:

18 U.S.C. 1961, et seq. [on succeeding pages

CHAPTER 96—RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

Sec.

1961. Definitions.
1962. Prohibited racketeering activities.[1]
1963. Criminal penalties.
1964. Civil remedies.
1965. Venue and process.
1966. Expedition of actions.
1967. Evidence.
1968. Civil investigative demand.

[1] So in original. Does not conform to section catchline.

Historical Note

1970 Amendment. Pub.L. 91–452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 941, added chapter 96 and items 1961 to 1968.

Cross References

Registration revoked for violation of this chapter by commodity dealer, see section 12a of Title 7, Agriculture

§ 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891–894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation

of stolen property), sections 2341–2346 (relating to trafficking in contraband cigarettes), sections 2421–24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections [1] (a), (b), or (c) of this section.

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

FILED
JUN 25 1993
OFFICE OF THE CLERK

(2)

No. 92-1857

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

Royal Food Products, Inc.,
Petitioner,

vs.

Buckeye Union Insurance Company, et. al.,
Respondents.

MOTIONS TO DISMISS AND FOR SANCTIONS
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI

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BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

I. WAS PETITIONER'S COMPLAINT PROPERLY DISMISSED FOR FAILURE TO STATE SPECIFIC ALLEGATIONS UNDER THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT AND OHIO REVISED CODE SECTION 2923, UPON WHICH RELIEF COULD BE GRANTED?

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STATEMENT OF THE CASE

Royal Food Products Company ("Royal") filed a four (4) part complaint against several parties, including the agencies herein: American States Insurance Company ("American States")[1]; Crabbe Brown Jones Potts & Schmidt ("Crabbe Brown"); Florence Nay ("Nay"); and Seasonings Etcetera, Inc. ("Seasonings")[2]; Lane Alton & Horst ("Lane Alton") and Wirtz & Kohn.

Royal alleged in count I of the complaint that all respondents violated the Racketeer Influenced and Corrupt

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[1]In accordance with Supreme Court Rule 29.1, Lincoln National Corporation is the parent company of American States and American States has no subsidiary companies.

[2]There is no parent or subsidiary company to list in accordance with Supreme Court Rule 29.1.

Organizations Act, 18 U.S.C. Section 1961, et. seq. In count II of the complaint, Royal alleged that Buckeye Union Casualty Co. breached its fiduciary duty as Royal's insurer. This count does not involve the parties represented in this brief in opposition. In count III of the complaint, Royal alleged that the respondents were liable for treble damages pursuant to 18 U.S.C. Section 1961 et. seq. In count IV of the complaint, Royal alleged that statutory sanctions should be imposed on the respondents pursuant to Chapter 2923 of the Ohio Revised Code.

Respondents filed motions to dismiss which were supported by memoranda of law and opposed through responses by Royal. The trial court dismissed all four (4) counts.

Following the dismissal, Royal presented a motion for relief from

judgment pursuant to Rule 60(B) of the Federal Rules of Civil Procedure. Certain defendants filed motions for sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure. The trial court overruled the motion for relief from judgment and granted the motions for sanctions.

Royal initiated an appeal in the Sixth Circuit. The appeals court affirmed the ruling of the trial court and imposed additional Rule 11 sanctions on petitioner on January 13, 1993. Petitioner requested a rehearing en banc on January 25, 1993 which was denied on February 24, 1993.[3]

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[3]Rule 14(a) for the United States Court of Appeals for the Sixth Circuit states:

> A suggestion of rehearing en banc will also be treated as a petition for rehearing before the original panel.

Supreme Court Rule 13.4 states:

The appeals court issued its mandate on March 4, 1993.

Royal then petitioned this court for

The time for file a petition for writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate. However, if a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari for all parties runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment. A suggestion made to a United State court of appeals for a rehearing en banc pursuant ot Rule 35(b), Federal Rules of Appellate Procedure, is not a petition for rehearing within the meaning of this Rule.

a writ of certiorari.

Petitioner asserts that it was a tenant at a building located at 407 North Grant Avenue, Columbus, Ohio, and that it had an insurance policy with Buckeye. (Complaint, paras. 4,. 5). On August 9, 1988, one of the floors at 407 Grant Avenue failed, a water main was fractured, and the petitioner lost inventory, operations, furniture and equipment. (Id., paras. 13, 24, 15). According to the petitioner, his insurer Buckeye, investigated the accident and allegedly determined that the floor collapsed as a result of an overload. (Id., paras. 16, 17). Petitioner asserts that defendant Seasonings caused the overload. (Id., para. 12).

According to the petitioner, Buckeye then paid the petitioner the policy limits that the petitioner was entitled to

receive under his policy that petitioner had with Buckeye. (Id., para. 37). Petitioner also asserts that respondents Lane Alton, Crabbe Brown, Nationwide, American States and Wirtz & Kohn are defending an action in the Court of Common Pleas of Franklin County, Ohio, filed by Grant Avenue Properties, the owner of the property at 407 North Grant Avenue, and are attempting to "blame Grant Avenue Properties for the accident and for the damages caused by said accident." (Id., paras. 28-34). Interestingly, counsel for the petitioner Royal in this action, is also counsel for Grant Avenue Properties in the state action in the Court of Common Pleas of Franklin County.

In count I of its complaint, Royal alleged that American, Crabbe Brown, Seasonings, Nay, Lane Alton, and Wirtz & Kohn violated RICO. (Id., paras. 1, 33).

In count III, Royal alleged that the above-named defendants were liable for treble damages pursuant to 18 U.S.C. Section 1961 et. seq. (Id, para. 39). In count IV, Royal alleged that statutory sanctions should be imposed upon said defendants pursuant to Chapter 2923 of the Ohio Revised Code.

SUMMARY OF THE ARGUMENT

In his petition for a writ of certiorari, counsel for the petitioner posed two questions for review.

I. Does not a highly constricted de novo review that ignores critical elements of the pleadings followed by a Rule 12(b)(6) dismissal constitute a deprivation of the constitutional right to trial?

II. Would not actions over a period of two years by a conspiracy among counsel as directed by their insurance company clients which demonstrate the use of perjury, fraud and other misconduct constitute such a pattern of racketeering activity as is prohibited by the Racketeer Influenced and Corrupt Organizations Act?

Petitioner then proceeds in a vain attempt to support his argument. As support, petitioner offers Conley v. Gibson, 355 U.S. 41 (1957), Hishon v. Spalding, 467 U.S. 69 (1984) and a More Definitive Statement made by petitioner's president. Petitioner also indicates that

both the trial court and appeals court relied only on one paragraph of the original 42 paragraph complaint. (Petition for a Writ of Certiorari by Royal Food Products pp. 14-15).

Petitioner quotes Hishon to say that dismissal should be affirmed only if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." (Id., pp. 14-15). This is precisely the standard applied by the district court at page 5 of its opinion in this case.

> It is well settled that a district court may not dismiss a claim under rule 12(b)(6) for failure to state a claim unless it is apparent beyond a doubt to the court that the plaintiff can prove no set of facts which would entitle him to relief. Conley v. Gibson, 355 U.S. at 45, 46. In determining whether the facts presented in a complaint support a claim upon which relief can be granted, the district court is to liberally construe the facts in the light most favorable to the plaintiff. Scheuer v. Rhodes, 416

U.S. 232, 236 (1974).

The district court on page 8 of its opinion held that,

> [P]laintiff's failure to plead even the most basic requirement of a RICO violation, racketeering activity, makes it clear that there is no conceivable set of facts which plaintiff could prove which would entitle it to relief. (Emphasis added).

Counsel for petitioner seems to be of the opinion that a More Definitive Statement from petitioner's president and a 42 paragraph complaint should support his "constitutional right to trial". Petitioner misses the important point that the More Definitive Statement and Complaint must contain worthwhile material to be considered helpful to his case.

While there is definitely a constitutional right to trial, petitioner has twice had his day in court and has failed miserably on both occasions.

Petitioner seems to have missed the more important and more critical points that a RICO cause of action must: plead precisely the RICO section allegedly violated, show a pattern of racketeering activity where there is both continuity and relationship among the predicated acts and allege the existence of a RICO enterprise.

The argument of respondents which follows, specifically and correctly addresses each of these elements. Respondents submit that after reviewing this argument in opposition, the petition for a Writ of Certiorari should be denied.

ARGUMENT IN OPPOSITION OF WRIT OF CERTIORARI

I. THE DISTRICT COURT PROPERLY GRANTED THE RESPONDENTS' MOTION TO DISMISS ON COUNTS I AND III BECAUSE THE PETITIONER FAILED TO STATE A CLAIM PURSUANT TO THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT, 18 U.S.C. SECTION 1961, ET. SEQ. (RICO) UPON WHICH RELIEF COULD BE GRANTED.

a. The Petitioner Failed To Allege The Commission Of Any Predicate Acts Or To Specify What Sections, If Any, Of 18 U.S.C. Section 1962 Respondents Allegedly Violated.

In a RICO case, it is essential to plead precisely the RICO section allegedly violated. Reynolds v. East Dyer Development Co., 882 F.2d 1249, 1251 (7th Cir. 1989). The plaintiffs in Reynolds contracted to have a new house built. Shortly after moving into the house, the plaintiffs began to experience problems with the house. Evidence suggested that the problems were caused by soft soil under the foundation. Before the

foundation was laid, the builder informed the plaintiffs that it had come across soft soil and explained to the plaintiff how he could cure the problem. The plaintiffs gave the builder their approval to continue with construction.

The plaintiffs filed suit against the land developers under RICO, 18 U.S.C. Section 1964. They alleged that the defendants received results of soil boring tests that showed that the plaintiffs and sixteen (16) other lots in the subdivision had soil unsuitable for building and that the defendant committed fraud by not disclosing the report before selling the lot. The circuit court upheld the dismissal of both RICO counts in part because the complaint failed to identify the RICO section allegedly violated. (Id., at 1251). The plaintiff's claim of fraud was not supported by allegations or

evidence that the defendants lied or attempted to conceal the soil conditions. (Id., at 1251, 1252).

Like the plaintiffs in Reynolds, the petitioner in the case at bar failed to identify any specific RICO sections violated by the respondents. The Court is not obliged to comb the record or to conduct the legal research necessary to construct an argument from the facts as given. (Id., at 1254). The petitioner cannot obtain relief under RICO because it did not allege a specific RICO violation. Therefore, the district court properly dismissed and the appeals court properly affirmed the dismissal of counts I and III.

As stated by the district court and agreed by the appeals court, there are only four (4) racketeering activities, as defined by 18 U.S.C. Section 1961, that

are even remotely related to the case at bar. (Opinion and order of the district court p. 6). The four sections are: (1) 18 U.S.C. Section 1503 (obstruction of justice); (2) 18 U.S.C. Section 1512 (tampering with a witness, victim, or an informant); (3) 18 U.S.C. Section 1513 (retaliating against a witness, victim, or an informant); and (4) 18 U.S.C. Section 1957 (engaging in monetary transactions derived from specified unlawful activity). (Opinion and order of the district court pp. 6, 7). The petitioner's allegations do not meet the requirements for a violation under any of these sections.

Having failed to make an allegation of racketeering activity, the most fundamental element of a RICO claim, petitioner failed to state a claim in counts I and III upon which relief could be granted. Consequently, said complaints

were properly dismissed pursuant to Federal Rule 12(b)(6). Davis v. Passman, 442 U.S. 228, 244 (1979).

b. **Petitioner Failed To Allege Any Pattern of Racketeering Activity.**

Not only must a plaintiff allege specific RICO violations, but he must also show a pattern of racketeering activity. A pattern of activity is produced when there is both continuity and relationship among the predicate acts. H.J. Inc. v. Northwestern Bell Telephone Company, 492 U.S. 229 (1989). The petitioner failed to make such an allegation.

A pattern of racketeering activity requires at least two (2) acts of racketeering within ten (10) years of one another. U.S.C.A. 18 Section 1961(5). However, a pattern requires something more than two (2) isolated criminal offenses.

H.J. Inc., 492 U.S. at 237. In order for the acts to form a pattern, they must be related so as to be ordered or arranged. (Id., at 238).

In H.J. Inc., petitioners, customers of Northwestern Bell Telephone Company, alleged that at different times over the course of at least six (6) years, officers and employees of the phone company gave bribes to members of the Minnesota Public Utilities Commission (MPUC). The alleged objective of the alleged bribes was to cause the commissioners to approve unfair and unreasonable phone rates. The Supreme court reversed summary judgment from the lower court holding that the petitioners had alleged multiple predicate acts since RICO defines bribery as a racketeering activity. (Id., at 250). Moreover, the Court held that petitioners may have been able to show that the predicate acts

constituted a pattern since the alleged acts of bribery were said to be related to the common purpose of influencing the decisions of the MPUC. (Id., at 250).

In addition to showing the relatedness of racketeering activities, a plaintiff must also show that the acts amount to or constitute a threat of continued racketeering activity. (Id., at 239). Continuity over a closed period may be established by proving a series of related predicates over a substantial period of time. (Id., at 242). Continuity may also be established by proving that acts over a shorter period of time constitute a threat of continuity. (Id., at 242). In H.J. Inc., the plaintiff may have been able to prove continuity since they alleged that the racketeering acts occurred frequently over a period of at least six (6) years. (Id., at 250). The

same allegations may have also established a threat of continuity by showing that the alleged bribes were a regular way of conducting business for Northwest Bell or for the MPUC.

In the case at bar, petitioner has failed to allege any pattern of racketeering. Petitioner has not alleged a relationship between any acts of racketeering nor has he alleged any acts which constitute continued racketeering activity or a threat of continued activity. Indeed, as previously explained, petitioner has not even alleged any predicate racketeering acts under RICO. Therefore, it is not possible that petitioner could have alleged a pattern of racketeering since no racketeering acts were alleged.

c. **The Petitioner Has Failed To Allege The Existence Of A RICO Enterprise.**

In a RICO action, the existence of a racketeering enterprise must be proven. United States v. Turkette, 452 U.S. 576, 580, 581 (1981). An enterprise can be a legal entity or any association in fact whereby a group of persons associate together for the common purpose of engaging in a course of conduct. (Id., at 582, 583). The existence of an enterprise is proven by evidence of an ongoing formal or informal organization and by evidence that the various associates function as a continuing unit. (Id., at 583). The plaintiff must present specific allegations from which it can be inferred that the defendant did belong to the association, the length of time the association lasted, and each defendants' role in the operation or management of the

enterprise. Plount v. American Home Assur. Co. Inc., 668 F.Supp. 204, 206 (S.D.N.Y. 1987).

Once again, the petitioner's failure to allege any racketeering activities precludes a finding of any set of facts under which a RICO enterprise can be found. Even if the petitioner's complaint can be construed as alleging an association-in-fact, he has failed to allege a RICO enterprise because he has failed to allege that the common purpose of the association is to conduct racketeering activity.

II. COUNT IV OF PETITIONER'S COMPLAINT WAS PROPERLY DISMISSED BECAUSE PETITIONER FAILED TO SHOW THAT HE IS ENTITLED TO RELIEF.

A complaint must do more than merely state a grievance. It must provide sufficient detail so that the defendant,

and the court, can obtain a fair idea of what the plaintiff is complaining of. Moore's Federal Practice, 2d Ed., Volume 2(A), Section 8.13, page 8-73. The petitioner asserts that sanctions should be imposed upon respondents "pursuant to Chapter 2923 of the Ohio Revised Code." (Complaint p. 9). However, the petitioner failed to specify which, if any, sections of Chapter 2923 of the Ohio Revised Code were violated. Furthermore, petitioner failed to plead any facts which would support a claim under Chapter 2923.

A pleading must show that the pleader is entitled to relief. Altman v. Central of Georgia Railway Co., 254 F.Supp. 167 (D.C. Cir. 1965) aff'd in part and rev'd in part 363 F.2d 284 (1966) cert denied 385 U.S. 920. Count IV of the petitioner's complaint failed to allege any facts whatsoever showing that the petitioner was

entitled to relief. Under Federal Rule 12(B)(6), a complaint may be dismissed if it fails to state a claim upon which judicial relief can be granted. Davis 442 U.S. at 244. Accordingly, the district court properly dismissed and the appeals court properly affirmed the dismissal of count IV of the petitioner's complaint.

CONCLUSION

The Petition for a Writ of Certiorari should be denied in this case because petitioner's complaint was properly dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6). Petitioner failed to specify which sections, if any, of 18 U.S.C. Section 1962 respondents allegedly violated. Petitioner failed to allege any pattern of racketeering activity and petitioner failed to allege the existence of a RICO enterprise. Petitioner also failed to show that he is entitled to relief on count IV of his original complaint.

Supreme Court Rule 10.1 states:

> A review of writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor.

There are no special and important reasons to exercise judicial discretion in this case. The district court and court of appeals have not departed from the accepted and usual course of judicial proceedings. The standard of Conley v. Gibson, 355 U.S. 41 (1957), was properly applied when granting the respondents' 12(b)(6) motion to dismiss. The requirements for pleading a RICO claim were also correctly evaluated.

Finally, the granting of Rule 11 sanctions by the district court and appeals court provides additional insight for this court that the Petition for a Writ of Certiorari is a baseless waste of this court's time. To date, petitioner's claim has been properly dismissed twice, and petitioner's counsel has been properly sanctioned twice in accordance with Federal Rule of Civil Procedure 11. A

denial of this Petition for a Writ of Certiorari would be a most fitting end to this unfounded protracted litigation.

Supreme Court, U.S
FILED
AUG 31 1993
OFFICE OF THE CLERK

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No. 92-1857

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

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Royal Food Products, Inc.

Petitioner

v.

Buckeye Union Insurance Company, et al.,

Respondents

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PETITIONER'S REPLY BRIEF TO BRIEF IN OPPOSITION

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Columbus OH 43206
Phone: 614/443-3033

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ARGUMENT

I. Questions Presented.

The opposition brief does not adequately address both questions presented for review. The issue of deprivation of the constitutional right to trial is, not surprisingly, neglected. Respondents state that petitioner has already had two days in court. However, when there is reversible error, the number of previous court appearances is rendered meaningless, especially when there has never been a hearing or trial on the merits.

On both occasions, the

respective courts reviewed motions to dismiss with a perfunctory and myopic review of the merits. Thus, a deprivation of petitioner's constitutional right to trial occurred.

Additionally, the Respondents refuse to accept the nature of its actions over a two year period as summarized in Petitioner's second question presented for review, that is "actions over a period of two years by a conspiracy among counsel as directed by their insurance company clients which demonstrate the use of perjury, fraud and other misconduct. . ."

PUBLISHER'S NOTE:

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the plaintiff can prove no set of facts which would entitle him to relief* * * *." However, rather than contending with the appellate decision, the opposition brief focuses on the district court's adjudication of the case. See Opposition brief at 9.

Examination of the appellate decision indicates its complete lack of analysis. Instead of scrutinizing the complicated set of facts alleged by Petitioner, the opinion merely states the relevant legal standards and baldly concludes, with no factual analysis whatsoever, that the pleading

threshold under RICO was not met.

The petitioners ask this Court to reverse the Sixth Circuit which refused or, at least, failed to apply the Fed. R. Civ. P. 12(b)(6) standard correctly. This standard is an extremely stringent one due to its harsh remedy: outright dismissal without any hearing on the merits whatsoever. Absent entirely from the opposition brief is a defense of the Sixth Circuit's reasoning and argument.

A. RICO: Predicate Acts and Existence of Conspiracy.

Respondents, in keeping with the reviewing courts in this case,

continue to ignore the relevant facts alleged by Petitioner which are sufficient to support a cause of action under the RICO statute. This Court has interpreted RICO's "racketeering activity" element broadly. In H.J., Inc. v. Northwestern Bell Telephone Company, 492 U.S. 229, 241 (1989), this Court rejected the "multiple scheme" limitation on RICO's "pattern" requirement because of lack of support in the statutory text or legislative materials. Earlier cases eschew a narrow reading of the legislation as well, emphasizing the RICO statute's use

of "terms and concepts of breadth." Russello v. United States, 464 U.S. 16, 21 (1983); see also Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497-498 (1985) ("RICO is to be read broadly" in accordance with "Congress' self-consciously expansive language and overall approach").

Specifically, the statute's "conduct or participate" requirement does not require proof that the defendant operated or managed an enterprise for the defendant to be held liable. Interpreted broadly by the courts, "conducts" test may be met "in a

variety of ways." H.J., Inc., 492 U.S. at 241.

Respondents in their opposition brief simply parrot the erroneous conclusions reached by the district court in this case in an attempt to obscure the sum result of their conduct. The opposition brief's prostrations that Petitioner failed to allege any racketeering enterprise or activity cannot be sustained by respondents' mere denial.

Petitioner has set forth in its petition for a writ of certiorari and, initially, in the Complaint, the Response for a More

Definite Statement and the Affidavits of John Bernard sufficient facts to allege the racketeering activity relating to interference with commerce. The facts reveal Buckeye Union's effort to deny Royal Foods proper payment for damage done to the building located at 407 North Grant Avenue. Such actions constitute illegal interference with the insurance procedure which had already taken place and which had inculpated Seasonings for the damage.

B. Sanctions

The Sixth Circuit erred when

it upheld the district court's award of sanctions pursuant to Fed. R. Civ. P. 11. The appellate court failed to overrule the district court's mistaken conclusion that Petitioner did not meet any single aspect of the RICO claim pled. First, the district court unreasonably found that because Petitioner's counsel witnessed most of the allegations of wrongdoing, Petitioner's counsel did not rely on the client for information. This is plainly controverted by the pleadings and evidence offered by Petitioner. As John Bernard's sworn statements unequivocally

state, counsel filed the suit at his direction and based on Bernard's knowledge of the facts as alleged in the complaint.

Additionally, the affidavits underscore that simply because Petitioner's counsel became acquainted with the parties involved in the scheme through the preparation of litigation in no way may serve as a basis for imposing sanctions. The RICO complaint contains allegations of facts ascertained by counsel through the client and was filed in good faith. Therefore, Petitioner asks this court to vacate the Sixth Circuit's

judgment on sanctions.

III. Other Issues.

Petitioner filed its plea for a writ of certiorari in this case on May 21, 1993. According to correspondence received from the respondents, their opposition brief was received by this Court on June 28, 1993, some thirty-eight days after the original submission. Under Supreme Court Rule 15.2, the time period for responding to the petition is thirty days unless enlarged by the Court or a Justice or by the Clerk under Rule 30.2. Petitioner received no notice of

relief under the rule. Therefore, the opposition brief was not timely filed and may be ignored by this Court in its discretion.

On another issue of accuracy, Respondents state "[i]nterestingly, counsel for the petitioner Royal in this action, [sic] is also counsel for Grant Avenue Properties in the state action in the Court of Common Pleas in Franklin County." See Opposition Brief at 6. This is an incorrect statement of fact: Royal Foods' counsel in this action originally filed the state RICO case but, very shortly thereafter, withdrew in favor of Attorney

Joseph Winner who has since litigated the case. This error in Respondents' brief would appear to allow a logical inference that the author of the brief had no prior involvement in any aspect of this case.

CONCLUSION

Devoid of any defense of the Sixth Circuit's opinion, Respondents' opposition brief thereby fails to present this Court with any compelling arguments which would preclude the granting of a writ of certiorari. Recitation of legal standards followed only by

skeletal conclusions as executed by the appellate court cannot serve as a legitimate adjudication of the issues presented in this case. Respondents, through their opposition brief, did no more to analyze the facts and applicable law than did the courts which purported to adjudicate the case.

Even if this Court should deny the writ of certiorari, Petitioner urges alternatively that this Court vacate the decision of the Sixth Circuit and remand the case to the district court for trial.

This Court should not uphold

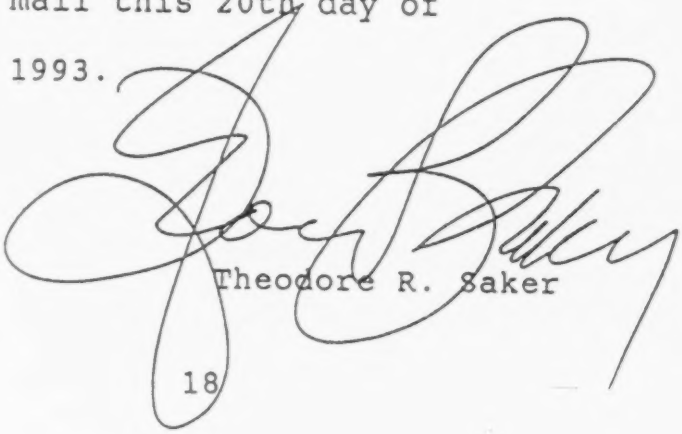
or sanction an appellate decision such as the one presented below: one that is devoid of any legal reasoning or analysis and only gives the most perfunctory review of the case in complete contravention of the 12(b)(6) standard by which it was bound.

Respectfully submitted,

Theodore R. Saker LPA
Counsel for Petitioner

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing brief was served upon Charles E. Brown, attorney for Crabbe Brown Schmidt and Jones, 500 S. Front Street, Columbus OH 43215; Theodore R. Munsell, attorney for Lane Alton & Horst, 175 S. Third Street, Columbus OH 43215 and Dennis P. Wirtz, attorney for Wirtz & Kohn, 6500 Busch Blvd, Cols OH 43229, by regular mail this 20th day of August, 1993.



Theodore R. Saker